political systems. In reality, however, it does not curb peoples' right to self-determination but, on the contrary, strengthens the principle by placing limits on rulers or other antidemocratic forces in a society.

The link between principles of the self-determination of peoples and respect for human rights – or maybe it would be better to say the filling of the principle of self-determination with humanitarian content – found further development in the processes of the dissolution of the USSR and Yugoslavia and especially in the reaction of the world community of states to these processes.

On 16 December 1991, the Council of the European Communities adopted a Declaration on 'Guidelines on the Recognition of New states in Eastern Europe and in the Soviet Union'. This document establishes the criteria and conditions for the recognition of new states which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations. The Declaration refers specially to the principles of self-determination as a basis for recognition.

Application of the principle of the self-determination of peoples is strongly influenced (or one may say, balanced) also by the principles of the inviolability of frontiers and territorial integrity of states. 'The sovereignty, territorial integrity and independence of states within the established international system, and the principle of self-determination of peoples, both of great value and importance, must not be permitted to work against each other in the period ahead', states a report prepared by the Secretary General of the UN, Dr Boutros-Ghali. The principles of the self-determination of peoples, the inviolability of frontiers and the territorial integrity of states are inseparable and support each other, which means that they should be balanced in the same way as justice and order need to be balanced in any society. One cannot have justice without order, while order without justice is not only inhuman but it also does not last long. Max Kampelman rightly observes that '[t]he inviolability of existing boundaries is an integral part of this process [of self-determination], not because the boundaries are necessarily sound or just, but because respect for them is necessary for peace and stability'.

The principle of the self-determination of peoples developed in the UN mainly in the context of the process of decolonisation. Though no document confines the principle for the decolonisation of colonies of overseas parent states (so-called 'salt water' colonialism), it was natural that at that time this aspect of the principle became the most prominent, and for some states even the only one.[24] Therefore Hector Gross Espiell wrote:

> The United Nations established the right of self-determination as a right of peoples under colonial and alien domination. The right does not apply to peoples already organised in the form of a state which are not under colonial and alien domination, since Resolution 1514 (XV) and other United Nations

24 India made the following reservation to article 1 of the Covenant on Civil and Political Rights: 'With reference to Article 1 of the International Covenant on Civil and Political Rights, the government of the Republic of India declares that the words "the right of self-determination" appearing in [that Article] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent states or to a section of a people or nation – which is the essence of national integrity' (UN Doc CCPR/C/Rev 3, 12 May 1992, p 18). France, Germany and the Netherlands strongly objected to this reservation by India *(ibid*, pp 39–40).

instruments condemn any attempt aimed at partial or total disruption of the national unity and the territorial integrity of the country.

It seem to me that, there are two flaws in this approach. First, that the principle applies only to peoples under colonial or alien domination and, second, the assumption that application of this principle to a sovereign (even multi-ethnic) state would inevitably be fraught with the disruption of its national unity or territorial integrity.

In the colonial context, the principle meant the independence of colonies from their parent state. However, the attitude of states[25] as well as that of international bodies clearly shows that the principle of the self-determination of peoples has a universal application and is an ongoing right of all peoples. Outside the colonial context, however, the meaning of the principle becomes less clear and more controversial.[26]

The historic roots of the principle of self-determination include the American Declaration of Independence and the decree of the French Constituent Assembly of May 1790, which refers both to the Rights of Man and to the rights of peoples. In the course of the 19th century European history the principle of nationality was influential and it was the *alter ego* of the principle of self-determination. These concepts, together with the concept of the protection of national minorities, were prominent in the deliberations of the Allied Supreme Council at Versailles in 1919. It is obvious that the concept of self-determination was not as yet accepted as a general principle. Thus the concept of racial equality was excluded form the Covenant of the League of Nations. Moreover, the Mandates System and the famous Minorities Treaties were conspicuous in their application only in certain cases. The special application of such institutions to defeated or newly established states only testified to the absence of a general recognition of the 'principle of equal rights and self-determination of peoples'. However, once the principle had been recognised as such, it was in the long run difficult – in terms both of morality and logic – to maintain that it only applied within the Americas and Europe. Thus, during and after the Second World War it was more and more accepted that self-determination was a universally applicable standard.

No doubt there has been continuing doubt and difficulty over the definition of what is a 'people' for the purpose of applying the principle of self-determination. None the less, the principle appears to have a core of reasonable certainty. This core consists in the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives. The concept of distinct character depends on a number of criteria which may appear in combination. Race (or nationality) is one of the more important of the relevant criteria, but the concept of race can only be expressed scientifically in terms of more specific features, in which matters of culture, language, religion, and group psychology predominate. The physical *indicia* of race and nationality may evidence the cultural distinctiveness of a group but they certainly do not inevitably condition it. Indeed, if the purely ethnic criteria are applied exclusively many long-standing national identities would be negated on academic grounds – such as, for example, the United States. In any case the

25 For example, the German objection to the Indian reservation to article 1 of the Covenant on Civil and Political Rights states: 'The right of self determination as enshrined in the Charter of the United Nations and as embodied in the Covenants applies to all peoples and not only to those under foreign domination' (UN Doc CCPR/Rev 3, p 39).

26 Rein Mullerson, *International Law, Rights and Politics*, 1994, London: Routledge at pp 5–64.

> community of states has been prepared to recognise both new states and the existence of legitimate claims by units of self-determination either by institutional procedures within the United Nations or on the basis of general recognition. Bangladesh, for example, was recognised as a state on the basis of general recognition by existing states. Provisions in written constitutions may acknowledge the relevance of self-determination to the affairs of multinational societies.
>
> It is my opinion that the heterogeneous terminology which has been used over the years – the references to 'nationalities', 'peoples', 'minorities', and 'indigenous populations' – involves essentially the same idea. Nor is this view based upon a theoretical construction. Once a member of a people or community is expressing political claims in public discourse in Geneva, New York, Ottawa, of Canberra, and using the available stock of concepts so to do, it seems to me that the type of political consciousness involved is broadly the same. The external participation of culturally distinct groups in the political process is essentially the same as that of individual states in respect of the Law of Nations. By this I mean that in order to obtain recognition of the claim to cultural identity, or to statehood, the claimant must accept the terms of the dialogue. This may sound rather obvious but it is in this context that I want to make the point that the opposition which appears in the sources between the definition of indigenous population 'by themselves' and their definition 'by others' is a false dichotomy.
>
> At this point I would like to stress that in practice the claim to self-determination does no necessarily involve a claim to statehood and secession. There are various models of 'self-government' or 'autonomy' but neither is a term of art. It is true that some models, such as Trusteeship, are related to the purpose of an ultimate transition to independence. However, there are a variety of other models, including that of 'Associated state' (as in the case of the Cook Islands and New Zealand), the regional autonomy of Austrians in the South Tyrol, the Cyprus Constitution of 1960, and the various arrangements within the Swiss and other confederations. There can be little doubt that federalism as a system provides a special capacity and a flexibility in facing cultural diversity. Federalism is probably better able than any other system to provide a regime of stable autonomy which provides group freedoms within a wider political cosmos and keeps the principle of nationality in line with ideas of mutuality and genuine coexistence of peoples.[27]

It now seems an accepted rule of international law that an entity created in defiance of the principle of self-determination cannot be considered a state. There remains the problem, however, of what constitutes a 'people' capable of exercising the right of self-determination. In this context it is worth considering and contrasting the position of the Scots, the Irish, the Croats, the Kurds, the Palestinians, the Basques, the people of Yorkshire, etc, etc. We shall return to the issue of self-determination when looking at the international law of human rights.

5.2.1.6 State succession

The transfer of territory from one state to another takes place in at least five ways:

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27 Ian Brownlie, 'The Rights of Peoples in Modern International Law', in Crawford (ed), *The Rights of Peoples*, 1988, Oxford: Oxford University Press at pp 4–6.

(a) cession;
(b) annexation;
(c) emancipation;
(d) formation of union;
(e) federation.

In all five situations one sovereign substitutes itself for another – there is a disruption of legal continuity.

5.2.2 Non self-governing territories/dependent states

There still exists, although the number is dwindling, a number of territories which have limited/restricted powers of control over their own affairs and can therefore not be considered as fully independent states. The question arises as to whether they possess any degree of international personality prior to full independence.

5.2.2.1 Colonies

Traditionally international law has not regarded colonies as possessing any international personality, because the control of the colony's foreign relations rested entirely in the hands of the colonial power. We have already seen when looking at the law of treaties that there is a presumption that treaties will apply to a colonial power and its colonial possessions. However with the development of the principle of self-determination, international law has come to recognise that for certain purposes 'pre-independent states' and national liberation movements may have some degree of international personality. For example, in 1974 the Palestine Liberation Organisation was accorded observer status at the United Nations, a position previously reserved solely for the representatives of sovereign states that were not at the time members of the United Nations. The head of the PLO was subsequently invited to address the UN General Assembly and PLO representatives have attended various UN conferences and meetings. Similarly the General Assembly recognised the South West African People's Organisation (SWAPO) as the sole representative of the people of Namibia. However, the exact nature of the personality of liberation movements is far from clear and in the case of *Tel-Oren v Libyan Arab Republic* 765 F 2d 774 (1984) a United States Court of Appeal declined to accept a case against the PLO in part on the ground that the PLO's obligations under international law were unclear.

Declaration on the Gaining of Independence to Colonial Territories and Peoples[28]

The General Assembly ... Declares that:

1 The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is conntrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation;

28 GA Resolution 1514 (XV), 14 December 1960 – adopted by 89 votes to nil, with nine abstentions. The abstaining states were Australia, Belgium, Dominican Republic, France, Portugal, South Africa, Spain, the UK and the USA.

2 All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development;

3 Inadequacy of political, economic, social or education preparedness should never serve as a pretext for delaying independence;

4 All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected;

5 Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independences and freedom;

6 Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations;

7 All states shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all states, and respect for the sovereign rights of all peoples and their territorial integrity

5.2.2.2 Protectorates

There are three situations where protection may be given by a foreign state:

(a) Protection may be exercised over a territory which did not have international personality before the protectorate was created. This occurred in the late 19th century in respect of a number of European states. In such situations the territory in question will only gain full international personality when it is clear that they are acting independently of the protecting state. For example, Kuwait became a British protectorate in 1899 and was gradually given increased control over its own affairs. Its independence was only formally acknowledged by the UK in 1961, but it is clear that Kuwait had achieved statehood and international personality before that time.

(b) Protection may be exercised over an already existing state. The arrangement will usually be covered by agreement between the protecting and the protected state and such protection does not usually affect the legal personality of the protected state. For example, Morocco was an independent state until the start of the 20th century when it was divided into three parts: Tangier became an international city, and the rest of Morocco was divided into a Spanish and a French zone. Foreign relations were completely within Spanish and French control, and France and Spain could conclude treaties on behalf of Morocco. Nevertheless in the *Rights of US Nationals in Morocco* case,[29] the ICJ held that during the period of the protectorate Morocco had retained its international personality.

29 [1952] *ICJ Rep* at p 176.

(c) In a few specific cases one state may exercise a protective power over a much smaller state without that smaller state losing its international personality, although the extent of that personality may be limited, eg San Marino, Monaco.

5.2.2.3 Mandates and Trust Territories

The Mandate system was introduced by the League of Nations to provide for the administration of the colonies and dependencies of the losing states in the First World War 'inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world'.[30] The territories concerned were divided into three classes:

Class A Territories were those parts of the Turkish Empire which were thought to be closest to independence and were put under the control of Britain or France. Only Iraq achieved independence under the Mandate system, Palestine (to the extent that it has), Transjordan, Syria and Lebanon only achieved independence as a result of the Second World War.

Class B Territories comprised peoples 'especially those of Central Africa, (who) are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military or naval bases and of military training of the natives for other than police purposes and the defence of the territory, and will also secure equal opportunities for the trade and commerce of other Members of the League'.[31] Included in the Class B Territories were Tanganyika, British and French Togoland, the British and French Cameroons, Rwanda. The territories concerned only gained independence after transfer to the UN Trusteeship system.

Class C Territories included certain territories 'which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to ... safeguards in the interests of the indigenous population'. Included in the Class C Mandates were Namibia, Samoa, and New Guinea.

When the League of Nations was disbanded to be succeeded by the United Nations a replacement was needed for the Mandate system and an entirely new 'trusteeship system' was established under Chapter XI of the UN Charter. Those territories held under Mandate were placed under the trusteeship system which would involve the conclusion of a trusteeship agreement between the administering authority and the United Nations. The main object of the system was 'to promote the political, economic, social and educational advancement of

30 Article 22, para 4 of the Covenant of the League of Nations 1919.

31 Article 22, para 5 of the League of Nations Covenant 1919.

32 Article 22, para 6 of the League of Nations Covenant 1919.

the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the people concerned'.[33]

The traditional view of Mandates and trusteeships was that, as long as they subsisted over a particular territory, that territory could not be regarded as having international personality. However, paralleling the situation with regard to colonies, increasingly the view has been expressed that Trust Territories do possess some degree of separate status and international personality, similar to that accorded to organisations such as the PLO.

> Namibia, even at the periods when it had been reduced to the status of a German colony or was subject to the South African Mandate, possessed a legal personality which was denied it only by the law now obsolete ... It nevertheless constituted a subject of law ... possessing national sovereignty but lacking the exercise thereof.[34]

All of the trust territories have now become independent states and the UN is considering the future role of the Trusteeship Council.

5.2.3 International organisations

> Accordingly, the Court has come to the conclusion that the [United Nations] Organisation is an international person. That is not the same thing as saying that it is a state, which it certainly is not, or that its legal personality and rights and duties are the same as those of a state ... What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.[35]

> Whilst ... specific acknowledgement of the possession of international personality is extremely rare, it is permissible to assume that most organisations created by a multilateral inter-governmental agreement will, so far as they are endowed with functions on the international plane, possess some measure of international personality in addition to the personality within the system of municipal law of the members ... Possession of international personality will normally involve, as a consequence, the attribution of power to make treaties, of privileges and immunities, of power to undertake legal proceedings: it will also pose a general problem of dissolution, for in the nature of things, the personality of all such organisations can be brought to an end.[36]

It is clear that international organisations are capable of possessing international personality and of being subjects of international law. The functions, rights and duties of such organisations are governed by what Starke refers to as international constitutional law. Institutions will be defined by reference to their legal functions and responsibilities and the constitutions of such institutions will set out their powers, objects and purpose – analogies can perhaps be drawn with municipal company law and a company's memorandum and articles of association. In that major respect international organisations differ from states

33 Article 76 of the UN Charter.

34 Judge Ammoun in the *Namibia* case [1971] *ICJ Rep* at 68.

35 ICJ in the *Reparations* case [1949] *ICJ Rep* at 174.

36 Bowett, *The Law of International Institution*s, 4th edn, 1982, London: Stevens at p 339.

in that their powers are limited and problems of sovereignty and jurisdiction do not arise. Almost everything is within the competence of states whereas anything not expressly within the powers of an international organisation is *prima facie ultra vires* – although certain powers may be implied, as in the *Reparations* case.

The criteria of legal personality of international organisations may be summarised as follows:

(1) a permanent association of states, with lawful objects equipped with organs to carry out those objects;

(2) a distinction between the organisation and its member states;

(3) the existence of legal powers exercisable on the international plane and not solely within the national system of one or more states.

As far as international organisations are concerned the principal questions to be decided are:

(1) the extent to which the organisation can conclude treaties;

(2) the privileges and immunities to which the organisation is entitled;

(3) the capacity of the organisation to bring international claims. It should however be noted at this point that only states have *locus standi* in contentious cases before the International Court of Justice.

5.2.4 Individuals

> [An individual] is a person in international law, though his capacities may be different from and less in number and substance than the capacities of states. An individual, for example, cannot acquire territory, he cannot make treaties, and he cannot have belligerent rights. But he can commit war crimes, and piracy, and crimes against humanity and foreign sovereigns and he can own property which international law protects, and he can have claims to compensation for acts arising *ex contractu* or *ex delicto*.[37]
>
> Any individual who commits a crime against the peace and security of mankind is responsible for such crime.[38]

37 O'Connell, *International Law*, Vol 1, 1970, London: Stevens at pp 108–09.

38 Article 3 of the Draft Code of Offences Against the Peace and Security of Mankind (1987) *ILC Ybk* Vol II, part II, 13.

CHAPTER 6

RECOGNITION AND LEGITIMATION

6.1 Introduction

It has already been seen that an important requirement of statehood is the capacity to enter into international legal relationships. This inevitably concerns the attitude of other states and in particular raises the question of recognition. Do other states recognise the new entity as a state? What are the implications if they do recognise it? What are the implications if they do not?

6.2 The theoretical issue

As is so often the case with international law, discussion of recognition has led to the development of two competing theories. The principal question which the two theories attempt to answer is whether recognition is a necessary requirement for or merely a consequence of international personality.

6.2.1 The constitutive theory

Underlying the constitutive theory is the view that every legal system requires some organ to determine with finality and certainty the subjects of the system. In the present international legal system that organ can only be the states, acting severally or collectively, and their determination must have definitive legal effect.

The constitutive theory developed in the 19th century and was closely allied to a positivist view of international law. According to that view the obligation to obey international law derives from the consent of individual states. The creation of a new state would create new legal obligations and existing states would need to consent to those new obligations. Therefore the acceptance of the new state by existing states was essential. A further argument prevalent during the late 19th century was based on the view of international law as existing between 'civilised nations'. New states could not automatically become members of the international community, it was recognition which created their membership. This had the further consequence that entities not recognised as states were not bound by international law, nor were the 'civilised nations' so bound in their dealings with them. Oppenheim stated the position thus:

> The formation of a new state is ... a matter of fact and not law. It is through recognition, which is a matter of law, that such a new state becomes subject to international law.[1]

Recognition is therefore seen as a requirement of international personality. A major criticism of this theory is that it leads to confusion where a new state is recognised by some states but not others. Lauterpacht attempted to get round this problem by alleging an international legal duty to recognise:

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1 Oppenheim's *International Law*, Vol 1, 8th edn, 1955, London: Longmans at p 544.

> To recognise a community as a state is to declare that it fulfils the conditions of statehood as required by international law. If those conditions are present, existing states are under a duty to grant recognition ... in granting or withholding recognition states do not claim and are not entitled to serve exclusively the interests of their national policy and convenience regardless of the principles of international law in the matter. Although recognition is thus declaratory of an existing fact, such declaration, made in the impartial fulfilment of a legal duty, is constitutive, as between the recognising state and the community so recognised, of international rights and duties associated with full statehood. Prior to recognition such rights and obligations exist only to the extent to which they have been expressly conceded or legitimately asserted, by reference to compelling rules of humanity and justice, either by the existing members of the international society or by the people claiming recognition.[2]

However, although states do make reference to the presence or absence of the factual characteristics of statehood when granting or refusing recognition, in the last resort their decision will normally be based on political expediency – there is no real evidence that states themselves feel that there is a legal duty to recognise when the other requirements of statehood have been satisfied. The question has recently arisen with respect to the territory of former Yugoslavia. In June 1991 Slovenia and Croatia declared their independence. The European Union and its member states did not recognise the two states immediately. In December 1991 Foreign Ministers of EU member states adopted 'Guidelines on the recognition of new states in Eastern Europe and in the Soviet Union'. This provided that recognition would be accorded to those new states which agreed to respect five conditions. The five conditions included matters such as respect for human rights, guarantees for minorities, respect for the inviolability of frontiers, acceptance of commitments to regional security and stability and to settle by agreement all questions concerning state succession. Slovenia, Croatia and Bosnia-Herzegovina agreed to the conditions and were formally accorded recognition in early 1992. It is clear that the conditions set down by the European Union exceeded the normal requirements of statehood. The implication would therefore seem to be that the EU viewed recognition as a political measure which was not required by any international obligation. It remains to be seen whether European practice will continue to use these conditions in all decisions on the recognition of new states or whether the application of the conditions will be restricted to the particular situation in the Balkans and Eastern Europe.

6.2.2 The declaratory theory

An early example of the declaratory theory is to be found in two provisions of the Montevideo Convention:

> The political existence of the state is independent of recognition by other states. Even before recognition the state has the right to defend its integrity and independence ... and to organise itself as it sees fit. The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law – Article 3.

2 Lauterpacht, *Recognition in International Law*, 1978, New York: AMS Press at p 6.

> The recognition of a state merely signifies that the state which recognises it accepts the personality of the other, with all the rights and duties determined by international law – Article 6.

For the adherents to the declaratory theory the formation of a new state is a matter of fact, not law. Recognition is a political act by which the recognising state indicates a willingness to initiate international relations with the recognised state and the question of international personality is independent of recognition. However, the act of recognition is not totally without legal significance because it does indicate that the recognising state considers that the new entity fulfils all the required conditions for becoming an international subject.

The declaratory theory is more widely supported by writers on international law today and it accords more readily with state practice, as is illustrated by the fact that non-recognised 'states' are quite commonly the object of international claims by the very states which are refusing recognition, for example Arab states have continued to maintain that Israel is bound by international law although few of them, until recently, have recognised Israel.

6.3 Non-recognition

The legal regime established by the Covenant of the League of Nations 1919 and the Kellogg-Briand Pact 1928 was the basis for the development of the principle that 'acquisition of territory or special advantages by illegal threat or use of force' would not create a title capable of recognition by other states. The principle achieved particular significance as a result of the Japanese invasion of Manchuria in 1931. The US Secretary of State, Stimson, declared that the illegal invasion would not be recognised as it was contrary to the Kellogg-Briand Pact which outlawed the use of war as an instrument of national policy. Thereafter the doctrine of not recognising any situation, treaty or agreement brought about by non-legal means was often referred to as the Stimson Doctrine.

However, state practice before the Second World War did not seem to support the view that the Stimson Doctrine contained a binding rule of international law. The Italian conquest of Abyssinia (Ethiopia) was recognised as was the German take-over of Czechoslovakia. After 1945 the principle was re-examined and the draft Declaration on the Rights and Duties of States prepared by the ILC emphasised that territorial acquisitions achieved in a manner inconsistent with international law should not be recognised by other states. Similarly the Declaration on Principles of International Law 1970 adopted by the UN General Assembly included a provision to the effect that no territorial acquisition resulting from the threat or use of force shall be recognised as legal. There have been a number of occasions where the Security Council of the United Nations has called on states not to accord recognition to situations which have arisen as a result of unlawful acts:

> The Security Council, deeply concerned about the situation in Southern Rhodesia ...
>
> 6 Calls upon all states not to recognise this illegal authority and not to entertain any diplomatic or other relations with it.[3]

3 Security Council Resolution, 20 November 1965.